THE BORNEO CO. LTD. v. BRAATHENS SOUTH AMERICAN & F.E. AIR TRANSPORT A.S.

[O.C. J. (Tan Ah Tah J.) January 8, 1958]

[Singapore — Suit No. 473 of 1953]

Carriage of Goods by Air — International Carriage — Liability of carrier — Warsaw Convention relating to International Carriage by Air, 1929, arts. 18(1), 22(2), 8(i), 9, 30 — Carriage by Air Act, 1932 — Order in Council, 1953.

On March 31, 1951 the plaintiffs delivered a case of watches to the defendants for carriage by air from Geneva to Singapore. The case of watches never reached Singapore and the plaintiffs claimed $17,986.03 as damages for the loss. The defendants, while admitting the value of the consignment and the loss contended: (1) Art. 11 para. 2(a) of the general conditions of carriage, to which the contract was subject, exempted them from liability for the loss, damage or destruction of the consignment, unless they had been negligent; (2) The plaintiffs had filed no complaint or claim within the time limit as provided for in Art. 12(1)(c) and (d) of the general conditions; (3) Art. 22(2) of the convention, which provides that in the carriage of goods, liability of the carrier is limited unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires, was not complied with, and therefore the maximum sum recoverable by the plaintiffs was $856-21; (4) the plaintiffs were barred from recovering by Art. 10 of the General conditions which provided that in the event of goods being forwarded or re-forwarded from the airport at the place of destination to any other place or address, such forwarding or reforwarding was to be carried out by the issuing carrier or the last carrier, as the case might be, as agent for the consignee and the defendants were not liable for any damage arising thereout, unless such damage could be proved to have been caused by their own negligence or wilful default; (5) the contract was one to be performed by various successive carriers within the meaning of Art. 30 of the convention; (6) the loss occurred after the case of watches had been handed over to another carrier and alternatively, the loss did not occur during the carriage by air.

Held: the Carriage by Air Act, 1932 applied to Singapore by virtue of the Order in Council, 1953, and that (1) Art. 11 para. 2(a) of the general conditions are null and void as coming within Art. 23 of the convention; (2) Art. 12(1)(c) and (d) are similarly null and void; (3) the defendants could not avail themselves of the provisions of the convention on the ground that they had not complied with Art. 8(a) to (i) and (q) of the convention; (4) there was no evidence that the case of watches was forwarded or re-forwarded from the airport in Singapore; (5) on the construction of the contract of carriage, it was not one to be performed by various successive carriers; and (6) there was no evidence that the watches reached Singapore, and the defendants had not discharged the onus of proof required of them under section 107 of the Evidence Ordinance.

[Editorial Note: the defendants appealed to the Court of Appeal, the decision of which is reported in [1959] M.L.J. 253. At the trial various issues were raised, but the Court of Appeal, agreeing with the conclusions of the learned trial Judge on the issue of "time limit" which they considered sufficient to dispose of the appeal, dismissed the appeal. As cases on Carriage of Goods by Air are very rare in this country, we feel that the judgment of the learned trial Judge will be helpful on the other grounds dealt with in the judgment.]

CLAIM FOR DAMAGES.

J. E. Lloyd for the plaintiffs.

F. R. N. H. Massey for the defendants.

Cur. Adv. Vult.

Tan Ah Tah J.: In this case the plaintiffs claim damages from the defendants in respect of the loss of a case of watches which was delivered to the defendants for carriage by air from Geneva to Singapore on the 31st March 1951. The defendants have admitted that the case which was delivered to them contained watches and it is not disputed that the value of the watches is $17,986.03.

On the 12th October 1929 a convention for the unification of certain rules relating to international carriage by air was signed at Warsaw. Subsequently, the Carriage by Air Act, 1932 was passed in the United Kingdom. In consequence of the passing of this Act, the provisions of the convention which are set out in the first schedule to the Act were given the force of law in the United Kingdom in relation to any carriage by air to which the convention applied, irrespective of the nationality of the aircraft performing the carriage. By an Order in Council made in 1934, the provisions of sections 1 and 2 of the Act, subject to certain adaptations and modifications, and the convention were extended to the Straits Settlements. This Order in Council has been replaced by another Order in Council made in 1953 which relates, *inter alia*, to Singapore.

It is common ground that the provisions of the convention apply to this case and that the carriage in question was an international carriage within the meaning of the convention. There is also no dispute that the case of watches was duly delivered to the defendants in Geneva by the consignor, who was the plaintiffs' agent, for carriage to the plaintiffs, who were the consignees, and that it was never delivered to the plaintiffs. During the trial it was conceded by counsel for the plaintiffs that there was no evidence to show that the defendants were common carriers; no question therefore arises as to their liability as common carriers.

The contract of carriage in this case took the form of an air consignment note but it was conceded by counsel for the plaintiffs that the contract was made subject to the defendants' general conditions of carriage of goods so long as such conditions were not inconsistent with the provisions of the convention. It will be convenient to refer to these conditions as the general conditions.

The defendants seek to exclude or limit their liability by relying on some of the general conditions. It is convenient to deal first with Article 11 paragraph 2(a) of the general conditions by which it is deemed to be agreed that the defendants will not be liable to the plaintiffs for, *inter alia*, the loss, damage or destruction of the consignment not occasioned by the negligence of

the defendants. This provision should be compared with Article 18(1) of the convention which reads as follows:

"The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air."

It is clear as a result of the comparison that, in framing Article 11 paragraph 2(a) of the general conditions as they have done, the defendants have sought to introduce into the contract of carriage terms or provisions which are more favourable to themselves than those contained in the convention. However, such a situation is dealt with by Article 23 of the convention which reads as follows:

"Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention."

In my opinion the provisions of Article 11 paragraph 2(a) of the general conditions come within the meaning of provisions tending to relieve the carrier of liability and are therefore null and void.

The next provision relied upon by the defendants is Article 12(1)(c) and (d) of the general conditions which reads as follows:

"(c) In case of non-arrival or non-delivery, the person entitled to delivery must complain to the carrier not later than 120 days after the date of acceptance of the consignment by the carrier.

(d) Failing complaint or claim in writing as provided in the foregoing sub-paragraphs, no action shall lie against the carrier, save in the case of fraud on its part."

The plaintiffs have admitted that no complaint or claim in writing was sent to the defendants within the time stated. It is relevant to observe that there is no provision in the convention prescribing that, in the event of loss of goods, notice should be given to the carrier within any period of time.

Counsel for the defendants contended that a provision which requires notice to be given within a certain number of days is not one which affects the question of liability. To my mind a provision to the effect that no action shall lie against the carrier if there has been a failure to lodge a complaint or claim in writing within a stated period is clearly one which tends to relieve the carrier of liability. It follows therefore in my opinion that, in view of Article 23 of the convention, this provision in the general conditions must be treated as null and void.

In order to limit their liability the defendants next relied on Article 22(2) of the convention which, so far as is material to this case, provides that in the carriage of goods, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. It was conceded by the plaintiffs that no special declaration of value had been made nor had any supplementary sum been paid to the carrier. Counsel on both sides agreed that if Article 22(2) were applicable to this case the maximum sum to which the plaintiffs would be entitled was $856.21 being the equivalent of 4,425 gold francs.

Now it is provided by Article 8 of the convention that the air consignment note shall contain the particulars which are set out in that Article. It is further provided by Article 9 that if the carrier accepts goods without an air consignment note having been made out, or if the air consignment note does not contain all the particulars set out in Article 8(a) to (i) inclusive and (q), the carrier shall not be entitled to avail himself of the provisions of the convention which exclude or limit his liability.

For the purpose of this judgment it is sufficient to refer to Article 8(i), which requires the weight, the quantity and the volume or dimensions of the goods to be stated in the air consignment note. A perusal of the air consignment note in this case makes it clear that neither the volume nor the dimensions of the goods are stated in it. That being so, the defendants are, in my opinion, not entitled to avail themselves of the provisions of Article 22(2) in order to limit their liability.

The next point relied upon by the defendants is based on Article 10 of the general conditions. They contended that under this Article, in the event of goods being forwarded or re-forwarded from the airport at the place of destination to any other place or address, such forwarding or re-forwarding was to be carried out by the issuing carrier or the last carrier, as the case might be, as agent of the consignee and the defendants were not to be liable for any damage arising thereout, unless such damage could be proved to have been caused by their own negligence or wilful default.

The evidence shows that several of the plaintiffs' employees went to the airport in connection with the consignment in question. They spoke to the employees of Pacific Overseas Airways Siam Ltd., who are alleged to have been the carriers of the consignment from Bangkok to Singapore. Some evidence based on hearsay was elicited. This purported to explain what had happened to the case of watches. It need hardly be said that this evidence was valueless. As a matter of fact, no one who might have had personal knowledge of the whereabouts of the case of watches was called to give evidence. A document which was alleged to be a forged inward declaration was put to one of the witnesses in cross-examination by counsel for the defendants but this document was not properly proved nor was there any evidence to show what use was made of it. The witnesses who might have proved this were not called. In my opinion there is no evidence to show that the case of watches was forwarded or re-forwarded from the airport in Singapore. Indeed, I would go further and

state my conclusion that there is no evidence to show that the case of watches reached Singapore.

I now turn to deal with the defendants' contention that the contract was one to be performed by various successive carriers within the meaning of Article 30 of the convention. In support of this contention counsel for the defendants relied, first, upon an admission made by the plaintiffs that their agents in Geneva knew that the defendants did not operate a direct service between Geneva and Singapore, secondly, upon a time-table which was admitted by the plaintiffs to have been in force at the material time, and thirdly, upon the fact that the air consignment note contains the words "Name of first air carrier and address: Braathens S.A.F.E., Oslo." As to the first point, the fact that the plaintiffs' agents knew that there was no direct service between Geneva and Singapore does not, in my opinion, necessarily mean that they were entering into a contract of carriage to be performed by various successive carriers. They may have been totally unconcerned as to the manner in which the contract was to be performed; what they were concerned with was that the goods should arrive at their destination. As to the second point, no definite conclusion can, in my view, be drawn from the existence of the time-table. As to the third point, it is true that the printed form of air consignment note which was used in this case contains the words "Name of first air carrier and address" in print, followed by the typewritten words "Braathens S.A.F.E., Oslo." But it is to be observed that there is no reference in the contract to a second or any successive air carrier or carriers. In my opinion, the fact that the phrase "first air carrier" appears in the air consignment note, without more, is too tenuous a ground on which to base an argument that the contract was one to be performed by various successive carriers. On this aspect of the case, it is relevant to refer to the footnote at page 347 of *Shawcross* and *Beaumont* on Air Law (2nd Edn.) which, so far as is material, reads as follows:

> "It should be noted that the wording is "to be performed", not "performed". It is submitted that the effect of the words "to be", coupled with the reference back in Art. 30(1) to Art. 1(3), is to make the decisive factor the contract for the carriage, not the method by which the carriage is in fact performed."

It seems to me that the submission contained in this footnote is a valid one. In my opinion it is a correct statement of law that, in determining whether a contract of carriage is one to be performed by various successive carriers, the decisive factor is the contract for the carriage and not the method by which the carriage is in fact performed.

In the present case the defendants no doubt had the right under Article 6 paragraph 4 of the general conditions to substitute alternative carriers where it became necessary to expedite the movement of a consignment. But the fact that they had this right did not make the contract one to be performed by various successive carriers. It is to be observed that the defendants appear to be entitled to exercise the right to substitute alternative carriers even though the contract was to be performed by a single carrier. In my opinion, on its true construction, the contract of carriage in the present case was not one to be performed by various successive carriers.

It was also contended by counsel for the defendants that the loss occurred after the case of watches had been handed over to the Pacific Overseas Airways Siam Ltd., and further or in the alternative that the loss did not occur during the carriage by air. As to the first of these contentions, it is sufficient to say that there was no evidence that the case of watches was delivered to the Pacific Overseas Airways Siam Ltd. With regard to the contention that the loss did not occur during the carriage by air, it cannot be disputed that the case of watches was duly delivered to the defendants in Geneva for carriage by air to the plaintiffs in Singapore. As I have already stated, there is no evidence to show that the goods reached Singapore. In point of fact, there is no evidence to show what happened to the goods after they were delivered to the defendants. It is provided by section 107 of the Evidence Ordinance that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. In the present case the facts relating to the manner in which the goods were dealt with from the time they were handed over to the defendants up to the time of the discovery of the loss are especially within the knowledge of the defendants. However, the defendants have not called a single witness to testify to the facts and to explain what happened to the goods and what precautions were taken to prevent the loss of goods carried by them. In the circumstances I have come to the conclusion that the loss occurred during the carriage by air, and further that the defendants have failed to prove any of the allegations on which they have relied in defending this action.

For the reasons which I have stated there will be judgment for the plaintiffs for the sum of $17,986.03 with costs.

Judgment for the plaintiffs.

Solicitors: *Drew & Napier; Allen & Gledhill.*

KHAW JOO JEANG & ORS. v. KOAY SENG CHYE & ORS.

[O. C. J. (Rigby J.) December 7, 1959]

[Penang — Civil Suit No. 109 of 1959]

Landlord and Tenant — Lease of vacant land — Erection of 'hut' on land — Termination of lease — Licensees or sub-tenants — Control of Rent Ordinance, 1956 — Meaning of 'Premises' — Whether 'hut' a building of temporary character — Fixture.

The plaintiffs, who were the legal owners of a piece of land, leased it as vacant land in 1942 to a firm in which the first three defendants were partners. During the currency of the tenancy a 'hut' was erected on the land and was subsequently occupied by the other four defendants. The tenancy was terminated by notice on November 30, 1958, and the plaintiffs sought a declaration that the defendants were not entitled to remain on